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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 SOUTHERN DIVISION

13 OLGA LILIA TOSCANO,) No. SA CV 12-78-AHS
14 Defendant-Petitioner,) (SA CR 04-281-AHS)
15 v.) GOVERNMENT'S OPPOSITION TO
16 UNITED STATES OF AMERICA,) DEFENDANT'S MOTION FOR RELIEF
17 Plaintiff-Respondent.) PURSUANT TO 28 U.S.C. § 2255;
18) DECLARATIONS; EXHIBITS
19)

20 Plaintiff-Respondent, by and through its attorney of record,
21 the United States Attorney for the Central District of
22 California, hereby files its opposition to Defendant-Petitioner
23 OLGA LILIA TOSCANO's motion for relief pursuant to 28 U.S.C.
24 § 2255 ("2255 Motion").

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1 The government's opposition is based on the attached
2 memorandum of points and authorities, the attached declarations
3 and exhibits, and the records and files in this case.

4 Dated: April 23, 2012

Respectfully submitted,

5 ANDRÉ BIROTTE JR.
6 United States Attorney

7 DENNISE D. WILLETT
8 Assistant United States Attorney
9 Chief, Santa Ana Branch Office

10 _____/S/_____
11 JEANNIE M. JOSEPH
12 Assistant United States Attorney

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 Defendant OLGA LILIA TOSCANO ("defendant") seeks in her 2255
5 Motion to reduce her 78-month sentence to 30 months, alleging
6 that her attorney was ineffective in obtaining, and government
7 counsel engaged in misconduct for failing to make, a Rule 35
8 motion for a reduced sentence after her conviction in a federal
9 white collar criminal case. As an initial matter, defendant's
10 2255 Motion is untimely and should be dismissed. In addition,
11 defendant's 2255 Motion fails on the merits. Defendant's
12 counsel, an attorney who specializes in federal white collar
13 criminal defense, was not ineffective in determining that
14 defendant had a better chance to reduce her sentence through
15 post-conviction cooperation, rather than through a direct appeal
16 of the reasonableness of her sentence. Nor did the government
17 engage in misconduct by not bringing a Rule 35 motion, as
18 defendant ultimately did not provide substantial assistance to
19 the government. Thus, defendant's 2255 Motion should be denied.

20 II.

21 STATEMENT OF FACTS

22 **A. Introduction**

23 This was a conspiracy and mail fraud prosecution against
24 defendant, as well as four other co-conspirators (collectively,
25 "defendants"), for their participation in a scheme to defraud
26 patients and health insurers in connection with outpatient
27
28

1 medical procedures. (CR 1.)¹ Using false statements, and
2 promises of cash and discounted cosmetic surgery, defendants
3 induced patients to use their health insurance to undergo
4 unnecessary, risky, and overpriced diagnostic procedures such as
5 endoscopies ("EGDs"), colonoscopies, and laparoscopies. (Id.)

6 On November 13, 2007, the matter proceeded to trial against
7 defendant and co-defendant MARIA LICEA ROSALES ("ROSALES"). (CR
8 170.)

9 **B. Trial Evidence**

10 At trial the evidence showed, among other things, as
11 follows: Millennium Outpatient Surgery Center ("MOSC") was being
12 used to commit health care-related fraud involving the U.S.
13 mails. Co-defendant THU NGOC PHAM ("PHAM") was the owner and
14 operator of MOSC. Defendant, ROSALES, and co-defendant ESMERELDA
15 ORTIZ TELLO were marketers for MOSC who illegally recruited
16 patients by offering them kickbacks, such as money and free or
17 discounted cosmetic surgeries, in exchange for undergoing
18 invasive and unnecessary medical procedures such as EDGs,
19 colonoscopies, and laparoscopies, which could be billed at
20 exorbitant rates to a patient's PPO health insurance.

21 Defendants also had employees at various businesses act as
22 sub-marketers for them to recruit other employees at those
23 businesses to be patients of MOSC, as well as other surgery
24 centers. Defendants coached patients to state to doctors false
25 symptoms that they did not have in order to fabricate medical

26
27
28 ¹ "CR" refers to the clerk's record in U.S. v. Millennium,
et al., SA CR 04-182-AHS.

1 necessity for the functional procedures billed to health
2 insurance companies. Further, defendants represented to patients
3 that MOSC would not collect the portion of the charges for the
4 medical procedures that would be the patient's responsibility
5 under their insurance plan; at the same time, defendants
6 represented to insurance companies that patient's were advised of
7 their responsibility for these charges.

8 Defendants knew and caused the mails to be utilized in
9 connection with billing the insurance companies, submitting
10 claims information and supporting documentation, and submitting
11 the patients' signed Explanation of Insurance Benefits Forms
12 containing false statements about patients' symptoms and false
13 promises to pay large percentages of MOSC's exorbitant charges.
14 Defendants mislead patients about their true financial liability,
15 and medical and financial risks, of participating in the scheme.

16 Defendants unlawfully paid kickbacks to their recruited
17 patients. For the first part of the scheme, PHAM paid the
18 marketers and other patient recruiters in cash. Later, the
19 marketers were paid with checks. Not including cash from PHAM,
20 defendant made approximately \$890,000 (\$200,000 for MOSC
21 recruited patients and \$693,000 from Unity Surgery Center). PHAM
22 also would compensate the marketers and other patient recruiters
23 by directly paying for various bills.

24 During the scheme, defendant told her roommate that she
25 believed what they were doing was fraudulent and illegal.

26 **C. Conviction and Sentencing**

27 On December 19, 2007, defendant and ROSALES were convicted
28 by a jury of conspiracy to commit mail fraud and to use the mails

1 to promote commercial bribery from approximately January 1, 2000
2 to March 17, 2004 in connection with their roles as marketers for
3 MOSC. (CR 216.) In addition, defendant was convicted of four
4 substantive counts of mail fraud. (Id.) On June 10, 2008, the
5 Court denied defendant's motion for judgment of acquittal and
6 motion for new trial. (CR 294).

7 Defendant was sentenced on November 21, 2008. (CR 329.) In
8 connection with sentencing, defendant contested a number of
9 sentencing enhancements, including loss, reckless risk of death
10 or serious bodily injury, role, and obstruction of justice;
11 defendant also made arguments regarding application of 18 U.S.C.
12 § 3553 factors. (Criminal Minutes Re: Sentencing, attached as
13 Exhibit E to the Declaration of Jeannie M. Joseph ("Joseph
14 Decl.") p. 1-3, 9.) The Court found - under a heightened clear
15 and convincing standard - that actual loss was approximately \$1.6
16 million based upon MOSC records showing that this was the amount
17 paid by health insurance companies for surgeries on patients
18 specifically recruited by defendant for a limited time period
19 (less than the total time period of the scheme). (Id. at p. 6-
20 7.) The Court did not use intended loss, which was recommended
21 by the U.S. Probation Office in the Pre-Sentence Report, of
22 approximately \$4.9 million that was billed to insurance companies
23 for these same patients during the limited time period. (Id.)
24 The Court did not apply enhancements for reckless risk of death
25 or serious bodily injury or obstruction of justice, but did apply
26 a role adjustment because defendant recruited accomplices to the
27 scheme. (Id. at p. 7-8.) The Court also considered personal
28 characteristics of defendant, including her family situation and

1 employment history. (Id. at p. 9-10.) While noting defendant's
2 sentencing range under the Guidelines to be 78-97 months
3 imprisonment, the Court sentenced defendant to 78 months
4 imprisonment based upon a consideration of 18 U.S.C. § 3553
5 factors "without reference to the Guidelines range." (Id. at p.
6 9.) The judgment was entered on November 25, 2008. (CR 330.)

7 **D. Appeal and Post-Conviction Agreement**

8 Defendant retained attorney Mark H. Allenbaugh's law firm,
9 which specialized in federal white collar criminal defense and
10 sentencing, to handle her federal case post-conviction ("Federal
11 Case"), as well as a related prosecution in state court ("State
12 Case"). (Declaration of Mark H. Allenbaugh ("Allenbaugh Decl.")
13 ¶¶ 1-3.) When he was retained, Mr. Allenbaugh reviewed the trial
14 and sentencing records in defendant's Federal Case for any
15 potential appellate issues, and found no appealable trial errors
16 to challenge defendant's conviction. (Id. at ¶ 4.)

17 Mr. Allenbaugh determined that the only possible avenue of appeal
18 was a general appeal of the reasonableness of defendant's 78-
19 month sentence. (Id.) Subsequently, Mr. Allenbaugh conferred
20 with defendant about his findings and related to defendant that,
21 given the discretion judges are allowed at sentencing, a direct
22 appeal of her sentence had only a very slim likelihood of
23 resulting in a remand for re-sentencing, and that typically the
24 Ninth Circuit takes two years to decide an appeal, although it
25 could be longer. (Id.) Defendant decided to have Mr. Allenbaugh
26 file (on her behalf) a direct appeal of the reasonableness of her
27 sentence. (Id.) On or about April 29, 2009, Mr. Allenbaugh
28 filed an appeal of defendant's sentence based upon: the

1 irrationality of Sentencing Guidelines Section 2B1.1, the
2 evidentiary standard applied at defendant's sentencing, the
3 calculation of loss, and the applicability of 18 U.S.C. § 3553
4 factors. (Id. at ¶ 5; Opening Brief attached as Exhibit F to
5 Joseph Decl.)

6 However, given Mr. Allenbaugh's assessment of defendant's
7 unlikely chance of success on direct appeal, Mr. Allenbaugh
8 suggested to defendant that she try to provide cooperation to the
9 government to obtain a post-conviction reduction in her sentence
10 pursuant to Rule 35 of the Federal Rules of Criminal Procedure
11 ("Rule 35 Motion"). (Allenbaugh Decl. ¶¶ 6, 10.) Defendant was
12 interested in pursuing a Rule 35 Motion. (Id. at ¶ 6.) Thus,
13 Mr. Allenbaugh questioned defendant about any subject on which
14 she could provide cooperation to the government of criminal
15 wrongdoing by others, both related to the State Case and Federal
16 Case, as well as unrelated matters. (Id.) Thereafter, on or
17 about May 4, 2009, Mr. Allenbaugh sent a letter to the Assistant
18 United States Attorney ("AUSA") who handled defendant's case,
19 Kenneth B. Julian, and outlined the potential cooperation that
20 defendant could provide to the government. (Id.; Exhibit A
21 attached to Allenbaugh Decl. ¶ 6.) The potential cooperation
22 that Mr. Allenbaugh outlined included a specific list of targets
23 related to the MOSC scheme charged in the State Case and Federal
24 Case, as well as "further information of individuals and
25 organizations unrelated" to the State Case and Federal Case.
26 (Id.)

27 AUSA Julian responded to Mr. Allenbaugh's letter, indicating
28 that he was interested in potential cooperation by defendant, but

1 that defendant would have to enter into a Post-Conviction
 2 Agreement and dismiss her appeal in order to be considered for
 3 Rule 35 post-conviction relief. (Allenbaugh Decl. ¶ 7.) AUSA
 4 Julian explained that, as with entry into a cooperating plea
 5 agreement, the government required waiver of a defendant's appeal
 6 for a few reasons: part of the defendant's cooperation would
 7 have to involve an admission of wrongdoing and an acceptance of
 8 her sentence; the government would not want to expend resources
 9 to explore cooperation while at the same time having to expend
 10 additional resources litigating defendant's claims on appeal; and
 11 a cooperator who was litigating her own conviction or sentence
 12 would not make a credible witness against another defendant.
 13 (Id.) Thereafter, AUSA Julian sent Mr. Allenbaugh a Post-
 14 Conviction Agreement. (Id.)

15 The Post-Conviction Agreement contained the following
 16 provisions that outlined the discretionary nature of a Rule 35
 17 motion based on substantial assistance:

18 d) If the USAO determines, in its exclusive judgment,
 19 that defendant has both complied with her obligations
 20 under this agreement and provided substantial
 21 assistance to state or federal law enforcement in the
 22 prosecution or investigation of another ("substantial
 assistance"), to move the Court pursuant to Rule 35 of
 the Federal Rules of Criminal Procedure for a reduction
 in defendant's sentence.

22

23 DEFENDANT'S UNDERSTANDINGS REGARDING
 24 SUBSTANTIAL ASSISTANCE

25 Defendant understands the following:

26

27 b) Nothing in this agreement requires the USAO or any
 28 other prosecuting or law enforcement agency to accept
 any cooperation or assistance that defendant may offer,
 or to use it in any particular way.

1 c) At this time the USAO makes no agreement or
2 representation as to whether any cooperation that
3 defendant has provided or intends to provide
4 constitutes substantial assistance. The decision
5 whether defendant has provided substantial assistance
6 rests solely within the discretion of the USAO.

7 (Post-Conviction Agreement ¶¶ 5-6 (emphasis added), attached as
8 Exhibit B to Allenbaugh Decl. ¶ 8.)

9 Mr. Allenbaugh read through the entire Post-Conviction
10 Agreement with defendant, including the sections on the dismissal
11 of her direct appeal and the discretionary nature of the Rule 35
12 Motion. (Allenbaugh Decl. ¶ 8.) Mr. Allenbaugh also discussed
13 with defendant the pros and cons of entering into the Post-
14 Conviction Agreement. (Id.) Mr. Allenbaugh specifically related
15 to defendant that, under the agreement, the government did not
16 have to use defendant's cooperation or make a Rule 35 Motion;
17 and, if the government decided for whatever reason not to make
18 the Rule 35 Motion, defendant would not be able to get her direct
19 appeal rights back, i.e., defendant would not be able to re-file
20 and pursue the direct appeal of her sentence. (Id.) Further,
21 Mr. Allenbaugh explained to defendant that defendant could still
22 file a 2255 Motion based upon ineffective assistance of counsel
23 within one year from the date that she dismissed her direct
24 appeal. (Id.) Ultimately, after discussing the Post-Conviction
25 Agreement at some length with Mr. Allenbaugh, defendant chose to
26 enter into the Post-Conviction Agreement and signed the agreement
27 on May 23, 2009. (Allenbaugh Decl. ¶¶ 8, 10.) In the signature
28 paragraph, defendant acknowledged that she reviewed all terms of
29 the Post-Conviction Agreement with her attorney, understood the
30 terms, and voluntarily agreed to the terms:

1 I have read this agreement and carefully discussed
2 every part of it with my attorney. This agreement has
3 been read to me in Spanish, the language I understand
4 best, and I have carefully discussed every part of it
5 with my attorney. I understand the terms of this
6 agreement, and I voluntarily agree to those terms. My
7 attorney has advised me of the consequences of entering
8 into this agreement. No promises or inducement have
9 been made to me other than those contained in this
10 agreement. No one has threatened or forced me in any
11 way to enter into this agreement. Finally, I am
12 satisfied with the representation of my attorney in
13 this matter.

14 Post-Conviction Agreement pp. 5-6 (emphasis added), attached as
15 Exhibit B to Allenbaugh Decl. ¶ 8.) Mr. Allenbaugh also signed
16 the agreement, indicating that he had gone through the entire
17 agreement with defendant:

18 I am [defendant's] attorney. I have carefully
19 discussed every part of this agreement with my client.
20 Further, I have fully advised my client of her rights
21 and of the consequences of entering into this
22 agreement. To my knowledge, my client's decision to
23 enter into this agreement is an informed and voluntary
24 one.

25 (Id. at p. 6.) Thereafter, Mr. Allenbaugh sent the signed Post-
26 Conviction Agreement back to AUSA Julian. (Allenbaugh Decl.
27 ¶ 8.) When Mr. Allenbaugh received a fully-executed copy of the
28 Post-Conviction Agreement, he sent a copy to defendant and her
boyfriend, Jason Tillery. (Id. at ¶ 9.) On or about May 27,
2009, pursuant to the Post-Conviction Agreement, Mr. Allenbaugh
filed a motion to dismiss Ms. Toscano's appeal. (Id. at ¶ 8.)
The appeal was dismissed on or about June 12, 2009. (Id.)

Mr. Allenbaugh then contacted AUSA Jeannie Joseph, who took
over the handling of defendant's case after AUSA Julian left the
U.S. Attorney's Office. (Allenbaugh Decl. ¶ 11.) On August 7,
2009, Mr. Allenbaugh met with AUSA Joseph to discuss defendant's
cooperation. (Id.) AUSA Joseph related that most of the

1 specific targets identified in the letter were already being
2 prosecuted or handled in the Federal Case or by the State, and
3 that the only viable area of cooperation was other, non-related
4 matters, which were generally referred to in the letter. (Id.)
5 Mr. Allenbaugh discussed with AUSA Joseph everything that
6 defendant had related to him in terms of cooperation. (Id.)
7 AUSA Joseph reiterated that these subjects all seemed to relate
8 to the Federal Case or State Case, and inquired whether defendant
9 had anything unrelated or more recent. (Id.) The meeting ended
10 by Mr. Allenbaugh agreeing to see if defendant had any additional
11 areas of potential cooperation. (Id.)

12 On or about August 11, 2009, defendant was sentenced to six
13 years imprisonment in the State Case. (Allenbaugh Decl. ¶ 12.)

14 After meeting with AUSA Joseph, Mr. Allenbaugh spoke with
15 defendant a few times to inquire about additional areas where
16 defendant potentially could provide cooperation. (Allenbaugh
17 Decl., ¶ 13.) However, defendant continued to provide the same
18 targets and schemes related to the Federal Case and State Case;
19 defendant was unable to provide information against other inmates
20 and declined to work in an undercover capacity. (Id.)

21 Mr. Allenbaugh advised defendant, and Mr. Tillery, that if the
22 Rule 35 option did not work out, the deadline to file a 2255
23 appeal would be on or about June 12, 2010. (Id.)

24 On May 7 and 11, 2010, Mr. Allenbaugh received emails from
25 defendant inquiring about her case. (Allenbaugh Decl. ¶ 14.)
26 Defendant suggested in the emails that Mr. Allenbaugh communicate
27 with defendant thereafter by email given her limited access to
28 the telephone in jail. (Id.) Mr. Allenbaugh responded to

1 defendant's May 7, 2010 email the same day, advising defendant
2 that he sent a copy of the Rule 35 (Post-Conviction Agreement) to
3 her boyfriend and would like to set up a time to discuss her case
4 with her. (Id.) Mr. Allenbaugh responded to defendant's May 11,
5 2012 email the following day, outlining her options now that she
6 had been sentenced in the State Case. (Id.) Mr. Allenbaugh
7 referenced prior discussions with defendant about whether to
8 pursue the direct appeal of her sentence or take the Rule 35
9 option, and reminded defendant that defendant chose the Rule 35
10 option because the likelihood of success on her appeal was very
11 slim:

12 To be sure, if we had gone the direct appeal route, you
13 would have exhausted your financial resources there
14 with a very slim likelihood of a remand for
15 resentencing. Less than 5% of appeals result in a
16 remand for resentencing and you could have ended up
17 with the same sentence anyway upon remand. The reason
18 why I am explaining this to you is that the direct
19 appeal most likely would not have resulted in anything
20 (and we would still be waiting for the outcome of the
21 appeal at this juncture; the 9th Cir. generally takes
22 two years to decide an appeal, sometimes longer). [¶]
23 As you recall, I explained this to you which is why we
24 decided on the Rule 35 route.

25 (Id.; 5/12/10 email attached to 2255 Motion.) Mr. Allenbaugh
26 related that defendant's best option was still the potential Rule
27 35 Motion and inquired whether there was "ANYTHING she could
28 provide whether it is case related or not." (Id.)
29 Mr. Allenbaugh further explained that he would need cooperation
30 information from defendant via a letter for the Rule 35 option.
31 (Id.) Mr. Allenbaugh also noted that, as he had explained to
32 Mr. Tillery, defendant's options at this point were limited -
33 other than the potential Rule 35 Motion - to a 2255 Motion based
34 on ineffective assistance of counsel. (Id.) Finally,

1 Mr. Allenbaugh explained to defendant how to file a 2255 Motion
2 pro se. (Id.)

3 Defendant did not communicate with Mr. Allenbaugh until
4 approximately 10 months later, on or about March 3, 2011, when
5 Mr. Allenbaugh received an email from defendant. (Allenbaugh
6 Decl. ¶ 15; 3/3/11 email attached to 2255 Motion.) In the email,
7 defendant requested a copy of her appeal. (Id.) Mr. Allenbaugh
8 responded to defendant's email the same day, agreeing to send her
9 a copy of the appeal, but reminding her that she had dismissed
10 her appeal in order to pursue the Rule 35 option. (Id.) Mr.
11 Allenbaugh related that he previously had given a copy of the
12 Rule 35 (Post-Conviction Agreement) to Mr. Tillery, but would
13 mail another copy to defendant. (Id.) Mr. Allenbaugh also
14 related that defendant likely was out of time to file the 2255
15 Motion. (Id.)

16 Approximately 10 months later, on or about January 17, 2012,
17 defendant filed the instant 2255 Motion.

18 III.

19 LEGAL ANALYSIS

20 **A. Defendant's 2255 Motion Is Untimely and Should Be Dismissed**

21 1. Defendant did not timely file within one year

22 Generally, a 2255 Motion has a "1-year period of
23 limitation," which runs from the "date on which the judgment of
24 conviction becomes final." 28 U.S.C. § 2255(f)(1). In this
25 case, defendant's conviction became final on June 12, 2009, when
26 defendant dismissed her appeal. Defendant was told by her
27 attorney, Mr. Allenbaugh, that if she wished to file a 2255
28 Motion, it needed to be filed within one year from the date her

1 appeal was dismissed, on or about June 12, 2010. (Allenbaugh
2 Decl. ¶13.) However, defendant did not file her § 2255 Motion
3 until January 17, 2012, more than one year after her conviction
4 became final. As a result, her motion is time-barred and,
5 accordingly, should be dismissed.

6 Another possible commencement date for the limitations
7 period is one year from "the date on which the impediment to
8 making a motion created by governmental action in violation of
9 the Constitution or laws of the United States is removed, if the
10 movant was prevented from making a motion by such governmental
11 action." 28 U.S.C. § 2255(f)(2). Defendant here claims
12 unconstitutional government interference with the filing of her
13 2255 Motion. (2255 Motion p. 23.) Specifically, defendant
14 claims that she did not file her 2255 Motion because she was
15 waiting for the government to file a Rule 35 Motion. (Id.)

16 Defendant's argument lacks merit for a number of reasons.
17 First, although defendant dismissed her direct appeal pursuant to
18 the Post-Conviction Agreement, no where in the agreement did
19 defendant waive her right to file a 2255 Motion. The government
20 requested no commitment on defendant's part in connection with a
21 2255 Motion. Defendant could have filed a 2255 Motion and still
22 awaited a Rule 35 Motion by the government. Second, the
23 declaration of Mr. Allenbaum makes clear that there was no
24 government action to foreclose defendant filing a 2255 Motion; to
25 the contrary, Mr. Allenbaum advised defendant that she could
26 still file a 2255 Motion, instructed her of the statute of
27 limitations period, and explained to her how she could file a
28 2255 Motion pro se. (Allenbaugh Decl., ¶¶ 13-14.) In short,

1 there was no unconstitutional governmental impediment here to
2 defendant's filing a 2255 Motion.

3 Another possible commencement date for the limitations
4 period is one year from "the date on which the facts supporting
5 the claim or claims presented could have been discovered through
6 the exercise of due diligence." 28 U.S.C. § 2255(f)(4).²

7 Defendant claims - perhaps on this basis - that she could not
8 have known her counsel was ineffective (in not getting her a Rule
9 35 Motion) until after the time period for filing a 2255 motion
10 had passed. (2255 Motion p. 23.) However, per the terms of the
11 Post-Conviction Agreement and as explained to defendant by
12 Mr. Allenbaugh, defendant was never guaranteed a Rule 35 Motion.
13 (Post-Conviction Agreement ¶¶ 5(d), 6(b), (c); Allenbaugh Decl.
14 ¶ 8.) As such, the government's decision not to file a Rule 35
15 Motion did not establish a newly discovered fact giving rise to
16 an ineffective assistance of counsel claim. Further, Mr.
17 Allenbaugh never lulled defendant into not filing a 2255 Motion
18 by reassuring her that a Rule 35 Motion already had been filed,
19 as defendant now seems to claim (2255 Motion p. 23); rather, Mr.
20 Allenbaugh confirmed that he had sent a copy of the Post-
21 Conviction Agreement to both defendant and her boyfriend.
22 (Allenbaugh Decl. ¶¶ 9, 14, 16; 5/7/10 email attached to 2255
23 Motion.) In short, there were no new facts that defendant
24 recently discovered giving rise to her claim of ineffective
25 assistance of counsel. The facts were the same, within the year

26
27 ² The last limitations period is based upon reliance on a
28 new constitutional right (28 U.S.C. § 2255(f)(3)), which has no
relevance here.

1 following the dismissal of her appeal, and thereafter.

2 2. Defendant is not entitled to equitable tolling

3 Defendant also is not entitled to any equitable tolling of
4 the limitations period that would render her untimely § 2255
5 Motion timely. Although equitable tolling applies in the § 2255
6 context, see United States v. Battles, 362 F.3d 1195 (9th Cir.
7 2004), defendant is not eligible for such tolling.

8 To be eligible, a prisoner must demonstrate two facts.
9 First, there are "extraordinary circumstances beyond [the
10 defendant's] control that make it impossible to file a petition
11 on time." Calderon v. United States Dist. Court (Beeler), 128
12 F.3d 1283, 1288 (9th Cir. 1997), overruled in part on other
13 grounds, Calderon v. United States Dist. Court (Kelly), 163 F.3d
14 530 (9th Cir. 1998) (en banc); accord United States v. Schwartz,
15 274 F.3d 1220, 1224 (9th Cir. 2001). Second, "the extraordinary
16 circumstances were the cause of his untimeliness." Laws v.
17 Lamarque, 351 F.3d 919, 922 (9th Cir. 2002) (quoting Spitsyn v.
18 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (internal quotation
19 marks and citation omitted)). This is an onerous burden, and one
20 the defendant bears. See United States v. Marolf, 173 F.3d 1213,
21 1218 n.3 (9th Cir. 1999); accord Corjasso v. Ayers, 278 F.3d 874,
22 877 (9th Cir. 2002) (noting the "high hurdle" of proving
23 equitable tolling).

24 The Ninth Circuit has found equitable tolling to be
25 applicable in only a narrow class of cases, none of which is
26 implicated in this case. See, e.g., Corjasso, 278 F.3d at 878-79
27 (district court erroneously dismissed a "mixed" habeas petition
28 and did not return documents to defendant that he would need to

1 file timely habeas petition); Miles v. Prunty, 187 F.3d 1104,
2 1107 (9th Cir. 1999) (prison officials improperly handled habeas
3 petition and caused it to be filed late); Lott v. Mueller, 304
4 F.3d 918, 922-25 (9th Cir. 2002) (prison officials denied
5 defendant access to his legal files); Lamarque, 351 F.3d at 923-
6 24 (defendant's mental incompetence).

7 Notably, reliance on bad advice from counsel does not toll
8 the limitations period. See Miranda v. Castro, 292 F.3d 1063,
9 1067-68 (9th Cir.), cert. denied, 537 U.S. 1003 (2002); Frye v.
10 Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001), cert. denied, 535
11 U.S. 1055 (2002).

12 For all these reasons, this Court should dismiss defendant's
13 2255 Motion as untimely.

14 **B. Defendant Has Not Met the Strickland Test to Establish**
15 **Ineffective Assistance of Counsel**

16 1. The standard of review is highly deferential

17 Whether a defendant's ineffective assistance of counsel
18 claim has merit is determined by the two-pronged test established
19 in Strickland v. Washington, 466 U.S. 668 (1984). Specifically,
20 a convicted defendant seeking to overturn her sentence for
21 ineffective assistance of counsel must show that (1) "counsel's
22 representation fell below an objective standard of
23 reasonableness" and (2) there is a "reasonable probability that,
24 but for counsel's unprofessional errors, the result of the
25 proceeding would have been different." Strickland, 466 U.S. at
26 687-88, 694.

27 In evaluating whether counsel's representation fell below an
28 objective standard of reasonableness, the "deficient" performance

1 must be "so serious that counsel was not functioning as the
2 'counsel' guaranteed by the Sixth Amendment." Strickland, 466
3 U.S. at 687-688. Determining deficiency is a high standard, as
4 "[j]udicial scrutiny of counsel's performance must be highly
5 deferential [Courts] must indulge a strong presumption
6 that counsel's conduct falls within the wide range of reasonable
7 professional assistance . . . [and] counsel is strongly presumed
8 to have . . . made all significant decisions in the exercise of
9 reasonable professional judgment." Id. at 689-90. See also
10 United States v. Claiborne, 870 F.2d 1463, 1468 (9th Cir. 1989)
11 ("In applying the first prong [of Strickland], it is clear that a
12 reviewing court is not free to engage in after-the-fact second
13 guessing of strategic decisions made by defense counsel.
14 Instead, judicial scrutiny of counsel's performance must be
15 highly deferential" (citations omitted)). Moreover, courts must
16 assess counsel's overall performance throughout the case, rather
17 than one specific act or omission, to determine reasonable
18 professional assistance. Kimmelman v. Morrison, 477 U.S. 365,
19 386 (1986) ("Since there are countless ways to provide effective
20 assistance in any given case, unless consideration is given to
21 counsel's overall performance, before and at trial, it will be
22 all too easy for a court, examining counsel's defense after it
23 has proven unsuccessful, to conclude that a particular act or
24 omission was unreasonable" (citations and quotations omitted)).
25 Thus, the reasonableness of counsel's performance is to be
26 evaluated at the time of the alleged error and in light of all
27 the circumstances, and the standard of review is highly
28 deferential. Strickland, 466 U.S. at 689.

1 2. Mr. Allenbaugh's performance was not unreasonable or
2 deficient

3 Giving deference to the strategic decisions of
4 Mr. Allenbaugh, and considering the particular circumstances of
5 the defense, counsel's assistance was not unreasonable or
6 deficient. First, the likelihood of defendant's success on a
7 direct appeal of her sentence was low. Sentencing was heavily
8 litigated and the Court used a conservative calculation of actual
9 loss, did not apply all sentencing enhancements, and gave
10 defendant a low-end guideline sentence. (See generally Criminal
11 Minutes Re: Sentencing.) Further, the Court noted that it would
12 have applied the same sentence without regard to the Guidelines.
13 (Id. at p. 9.) Thus, the assessment of Mr. Allenbaugh, who
14 specializes in federal white collar criminal defense and
15 sentencing, that defendant had a low likelihood of success on
16 appeal and Rule 35 cooperation posed a greater chance for
17 reduction of her sentence, was reasonable. (Allenbaugh Decl.
18 ¶¶ 2, 4.)

19 Second, it is clear that Mr. Allenbaugh acted diligently in
20 ensuring that defendant's decision to dismiss her appeal and
21 pursue Rule 35 cooperation was an informed and voluntary
22 decision. Mr. Allenbaugh went through each term of the Post-
23 Conviction Agreement with defendant and discussed the
24 alternatives at length with defendant, including the fact that a
25 Rule 35 Motion by the government was discretionary. (Allenbaugh
26 Decl. ¶¶ 4, 6, 8, 10.) Further, it is clear from the Post-
27
28

1 Conviction Agreement itself³ that defendant understood a Rule 35
2 motion was within the government's discretion. (Post-Conviction
3 Agreement ¶¶ 5(d), 6(b), (c).) Defendant chose to pursue the
4 potential for Rule 35 cooperation and dismiss her appeal.
5 (Allenbaugh Decl. ¶¶ 6, 8, 10.)

6 Third it is clear that Mr. Allenbaugh reasonably pursued a
7 Rule 35 Motion for defendant based on cooperation. Mr.
8 Allenbaugh inquired of defendant multiple times about any
9 cooperation that she could provide the government. (Allenbaugh
10 Decl. ¶ 6, 13-14, 16.) Mr. Allenbaugh wrote to and met with the
11 government to relay that cooperation. (Id. at ¶¶ 6, 11.)
12 Defendant continued to provide the same targets and schemes
13 related to the Federal Case and State Case, was unable to provide
14 information against other inmates, and declined to work in an
15 undercover capacity. (Id. at ¶ 13.)

16 Fourth, it is clear that Mr. Allenbaugh adequately advised
17 defendant regarding her remaining 2255 Motion option. Nothing in
18 the Post-Conviction Agreement prevented defendant from filing a
19 2255 Motion. Mr. Allenbaugh advised defendant that she would
20 need to file a 2255 Motion based on ineffective assistance of
21 counsel within a year from the date that her appeal was
22 dismissed. (Allenbaugh Decl. ¶¶ 8, 13-14; 5/12/10 email.)
23 Specifically, in a May 12, 2012 email, Mr. Allenbaugh reiterated
24 to defendant the reasons defendant chose to dismiss her appeal to
25 pursue Rule 35 cooperation, inquired whether defendant could
26

27 ³ Defendant also acknowledged that the Post-Conviction
28 Agreement was read to her in Spanish in her signature paragraph.

1 provide anything further in terms of cooperation, reminded
2 defendant of the 2255 Motion option, and explained how defendant
3 could file the 2255 Motion pro se. (5/12/10 email.) Yet,
4 defendant then let 10 months lapse before she responded to Mr.
5 Allenbaugh's email, and then only to request a copy of her appeal
6 papers. (Allenbaugh Decl. ¶ 15; 3/3/11 email.) In response, Mr.
7 Allenbaugh again mentioned possible cooperation by defendant, but
8 advised defendant that, at this point, she may be out of time to
9 file a 2255 Motion. (Id.)

10 In sum, it appears that Mr. Allenbaugh reasonably assessed
11 that defendant's best chance to reduce her sentence was the Post-
12 Conviction Agreement and reasonably pursued cooperation.
13 However, defendant failed to provide any substantial assistance
14 to the government. This does not establish ineffective
15 assistance of counsel and, as such, defendant's 2255 Motion
16 should be denied.

17 3. There is no reasonably probability of a different
18 result

19 Even if defendant could establish that Mr. Allenbaugh's
20 performance was so unreasonable and deficient as to meet the
21 Strickland test (which she cannot, as set forth above),
22 defendant cannot established that the result - her sentence -
23 would have been different had she had different counsel.
24 Sentencing was heavily litigated and the Court used a
25 conservative calculation of actual loss, did not apply all
26 sentencing enhancements, and gave defendant a low-end guideline
27 sentence. Further, the Court noted that it would have applied
28 the same sentence without regard to the Guidelines. Thus, had

1 defendant not dismissed her appeal, it would have had little
2 chance of resulting in a reduction of her sentence before the
3 Ninth Circuit or before this Court on remand.

4 **C. Defendant Has Not Established Misconduct By The Government**

5 Defendant offers nothing but conjecture that Mr. Allenbaugh
6 colluded with the government to deprive defendant of her direct
7 appeal rights in entering into the Post-Conviction Agreement.

8 (2255 Motion pp. 20-22.) Mr. Allenbaugh denies any such
9 collusion. (Allenbaugh Decl. ¶ 10.) According to Mr.

10 Allenbaugh, it was his idea to pursue Rule 35 cooperation given
11 that defendant had little chance of success through a direct
12 appeal of her sentence. (Id. at ¶¶ 6, 10.) In response to Mr.

13 Allenbaugh's offer of post-conviction cooperation, AUSA Julian
14 provided a Post-Conviction Agreement. (Id. at ¶ 7.) The terms

15 of the Post-Conviction Agreement, including the discretionary
16 nature of the Rule 35 Motion, were clearly set forth and mirrored
17 the language of a typical cooperating plea agreement. Defendant

18 knowingly and voluntarily entered into the Post-Conviction
19 Agreement. (Id. at ¶¶ 8, 10.) Thereafter, the government

20 consulted with case agents and the State prosecutor regarding
21 potential areas of cooperation by defendant. (Id. at ¶ 11.) The

22 government also met with Mr. Allenbaugh and discussed potential
23 avenues for cooperation by defendant. (Id.) The cooperation

24 defendant sought to provide continued to relate to targets
25 already being prosecuted or handled in the Federal Case or by the
26 State, and defendant offered nothing unrelated or recent. (Id.

27 at ¶¶ 11, 13-14.) As such, the government determined that

28 defendant could not offer substantial assistance. There was no

1 government misconduct.

2 IV.

3 CONCLUSION

4 For all the foregoing reasons, and in light of the
5 aforementioned authorities, the government respectfully requests
6 that the Court deny defendant's 2255 Motion.

DECLARATION OF MARK H. ALLENBAUGH

I, Mark H. Allenbaugh, hereby declare as follows:

1. My prior firm, Allenbaugh Samini Ghosheh, LLP, was retained as counsel to represent defendant OLGA LILIA TOSCANO: (1) in or around June 2009, in connection with People v. Toscano, et al., 08ZF0025, a California state case charging Ms. Toscano with fraud, grand theft, and conspiracy, (the "State Case"); and (2) in or around July 2008, in connection with a related federal case where Ms. Toscano had already been convicted, United States v. Millennium, et al., No. SA CR 04-281-AHS (the "Federal Case"). My firm handled the sentencing and appeal. The appeal was subsequently withdrawn. I was the supervising attorney on all matters, and was counsel of record on the appeal. I make this declaration in response to Ms. Toscano's ineffective assistance of counsel claims set forth in her Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 ("2255 Motion"), in Toscano v. United States, No. SA CV 12-78-AHS.

2. I am an attorney at law licensed to practice in the States of Maryland and Virginia, and in the District of Columbia, and am the founding partner of the Law Offices of Mark H. Allenbaugh. One of my specialized practice areas is federal white collar criminal defense and sentencing. I am admitted to practice before several U.S. District Courts, the U.S. Courts of Appeals for the Fourth, Fifth, Sixth, and Ninth Circuits, and the U.S. Supreme Court. I have served as the Chair of the Federal Sentencing Guidelines Task Force for the District of Columbia Chapter of the Federal Bar Association, Co-Chair of the Federal

1 Sentencing Guidelines Committee for the National Association of
2 Criminal Defense Lawyers, and am a member of the American Bar
3 Association's Corrections and Sentencing Committee. I also am
4 co-editor of Sentencing, Sanctions, and Corrections: Federal and
5 State Law, Policy, and Practice (2d ed., Foundation Press, 2002).
6 Prior to entering private practice, I served as Staff Attorney
7 for the U.S. Sentencing Commission where I was assigned to the
8 Economic Crimes Policy Team. I have published numerous articles
9 on sentencing policy and criminal justice. I have handled
10 hundreds of criminals cases representing defendants charged with
11 and/or convicted of federal crimes, including handling their
12 appeals.

13 3. My prior firm and I were retained to represent
14 Ms. Toscano in post-conviction matters in the Federal Case. A
15 partner at my former firm, Mr. Donald (Andy) Purdy, also was
16 assigned to work on Ms. Toscano's Federal Case. Ms. Toscano
17 received a 78 month sentence in her federal case. Mr. Babak
18 Samini was assigned to her state case. Ms. Toscano received a
19 sentence of 72 months in the state case, to be served concurrent
20 with her federal sentence, of which she will have to serve far
21 less than that period of time in light of recent state prison
22 realignment legislation. Given that Ms. Toscano was
23 incarcerated, I communicated with her in person and by phone, and
24 later by email through CorrLinks. I also communicated to her
25 through her boyfriend, Jason Tillery.

26 4. When I was retained, I reviewed the trial and
27 sentencing records in Ms. Toscano's Federal Case for any
28 potential appellate issues. I found no appealable trial errors

1 to challenge Ms. Toscano's conviction. Thus, I determined that
2 the only possible avenue of appeal was a general appeal of the
3 reasonableness of Ms. Toscano's 78-month sentence. I conferred
4 with Ms. Toscano about my findings. I further related to
5 Ms. Toscano that, given the discretion judges are allowed at
6 sentencing, an appeal of her sentence had only a very slim
7 likelihood of resulting in a remand for re-sentencing, and that
8 typically the Ninth Circuit takes two years to decide an appeal,
9 and it could take longer. Ms. Toscano decided to have me file
10 (on her behalf) an appeal of the reasonableness of her sentence.

11 5. On or about April 29, 2009, I filed an appeal of
12 Ms. Toscano's sentence based upon: the irrationality of
13 Sentencing Guidelines Section 2B1.1, the evidentiary standard
14 applied at Ms. Toscano's sentencing, the calculation of loss, and
15 the applicability of 18 U.S.C. § 3553 factors.

16 6. Given my assessment of Ms. Toscano's unlikely chance of
17 success on her appeal, I suggested to her that she try to provide
18 cooperation to the government to obtain a post-conviction
19 reduction in her sentence pursuant to Rule 35 of the Federal
20 Rules of Criminal Procedure ("Rule 35 Motion"). Ms. Toscano was
21 interested in pursuing this. Thus, I questioned Ms. Toscano
22 about any subject on which she could provide cooperation to the
23 government of criminal wrongdoing by others, both related to the
24 State Case and Federal Case, and unrelated matters. Thereafter,
25 I contacted the Assistant United States Attorney ("AUSA") who
26 handled her case, Kenneth B. Julian, and outlined the potential
27 cooperation that Ms. Toscano could provide to the government.
28 The potential cooperation I outlined included a specific list of

1 targets related to the Millennium scheme charged in the State
2 Case and Federal Case, as well as "further information of
3 individuals and organizations unrelated" to the State Case and
4 Federal Case. Attached hereto as Exhibit A is a true and correct
5 copy of a letter dated May 4, 2009 that I sent to AUSA Julian in
6 this regard.

7 7. AUSA Julian responded to my letter, indicating that he
8 was interested in potential cooperation by Ms. Toscano, but that
9 Ms. Toscano would have to enter into a Post-Conviction Agreement
10 and dismiss her appeal in order to be considered for Rule 35
11 post-conviction relief. AUSA Julian explained that, as with
12 entry into a cooperating plea agreement, the government required
13 waiver of a defendant's appeal for a few reasons: part of the
14 defendant's cooperation would have to involve an admission of
15 wrongdoing and an acceptance of her sentence; the government
16 would not want to expend resources to explore cooperation while
17 at the same time having to expend additional resources litigating
18 defendant's claims on appeal; and a cooperator who was litigating
19 her own conviction or sentence would not make a credible witness
20 against another defendant. Thereafter, AUSA Julian sent me a
21 Post-Conviction Agreement.

22 8. I read through the entire Post-Conviction Agreement
23 with Ms. Toscano, including the sections on the dismissal of her
24 appeal and the discretionary nature of the Rule 35 Motion. I
25 also discussed with Ms. Toscano the pros and cons of entering
26 into the Post-Conviction Agreement. I specifically related to
27 Ms. Toscano that, under the agreement, the government did not
28 have to use Ms. Toscano's cooperation or make a Rule 35 Motion;

1 and, if the government decided for whatever reason not to make
2 the Rule 35 Motion, defendant would not be able to get her appeal
3 rights back, i.e., we would not be able to re-file and pursue a
4 direct appeal of her sentence. However, I explained to her that
5 she could still file a 2255 Motion based upon ineffective
6 assistance of counsel within one year from the date she dismissed
7 her appeal. Ultimately, after discussing the Post-Conviction
8 Agreement at some length, Ms. Toscano chose to enter into the
9 Post-Conviction Agreement and dismiss her appeal. Thereafter, I
10 sent the Post-Conviction Agreement signed by Ms. Toscano and
11 myself back to AUSA Julian and filed a motion to dismiss Ms.
12 Toscano's appeal. Attached hereto as Exhibit B is a true and
13 correct copy of the Post-Conviction Agreement signed by Ms.
14 Toscano and myself on May 23, 2009. Attached hereto as Exhibit C
15 is a true and correct copy of the Motion to Dismiss Appeal that I
16 filed on Ms. Toscano's behalf on or about May 27, 2009. Attached
17 hereto as Exhibit D is a true and correct copy of the order
18 dismissing Ms. Toscano's appeal dated June 12, 2009.

19 9. When AUSA Julian sent back to me a fully-executed copy
20 of the Post-Conviction Agreement, I sent a copy to Ms. Toscano
21 and Mr. Tillery.

22 10. The government did not suggest the Rule 35 Motion in
23 exchange for a dismissal of Ms. Toscano's appeal, nor did I
24 collude with the government to obtain Ms. Toscano's dismissal of
25 her appeal. I suggested the idea because I had determined, based
26 upon my experience and all the circumstances of Ms. Toscano's
27 case, particularly the fact that Ms. Toscano was unlikely to
28 prevail on her appeal, that the Rule 35 Motion was Ms. Toscano's

1 best chance for a reduction in her sentence. However, the
2 decision to enter into the Post-Conviction Agreement and waive
3 her appeal was Ms. Toscano's.

4 11. Shortly after Ms. Toscano entered into the Post-
5 Conviction Agreement, AUSA Julian left the U.S. Attorney's Office
6 and AUSA Jeannie Joseph took over the handling of Ms. Toscano's
7 case. I spoke with AUSA Joseph by telephone about meeting to
8 discuss Ms. Toscano's cooperation. I met with AUSA Joseph at her
9 office on or about August 7, 2009 to discuss Ms. Toscano's
10 cooperation. AUSA Joseph related to me that, in preparation for
11 the meeting, she had reviewed Ms. Toscano's proffer that took
12 place on November 17, 2004, prior to the trial in the Federal
13 Case. AUSA Joseph also related that she had gone through the
14 specific items listed in my May 4, 2009 letter regarding
15 Ms. Toscano's cooperation with the case agents in the Federal
16 Case and the prosecutor in the State Case. AUSA Joseph related
17 that most of the specific targets identified in the letter were
18 already being prosecuted or handled in the Federal Case or by the
19 State. AUSA Joseph related that the only viable area of
20 cooperation was other, non-related matters, which were generally
21 referred to in the letter. I discussed with AUSA Joseph
22 everything that Ms. Toscano had related to me in terms of
23 cooperation. AUSA Joseph reiterated that these subjects all
24 seemed to relate to the Federal Case or State Case, and inquired
25 whether Ms. Toscano had anything unrelated or more recent. We
26 ended the meeting by my agreeing to see if Ms. Toscano had any
27 additional areas of potential cooperation.
28

1 12. On or about August 11, 2009, defendant was sentenced to
2 six years imprisonment in the State Case.

3 13. After my meeting with AUSA Joseph, I spoke with Ms.
4 Toscano a few times to inquire about additional areas where she
5 potentially could provide cooperation. However, Ms. Toscano
6 continued to provide the same targets and schemes related to the
7 Federal Case and State Case. Ms. Toscano was unable to provide
8 information against other inmates and declined to work in an
9 undercover capacity. I advised Ms. Toscano, and Mr. Tillery,
10 that if the Rule 35 option did not work out, the deadline to file
11 a 2255 appeal would be on or about June 12, 2010.

12 14. On May 7 and 11, 2010, I received emails from Ms.
13 Toscano inquiring about her case. Ms. Toscano suggested in the
14 emails that we communicate thereafter by email. I responded to
15 her May 7, 2010 email the same day, advising her that I sent a
16 copy of the Rule 35 (Post-Conviction Agreement) to her boyfriend
17 and would like to set up a time to discuss her case with her. I
18 responded to her May 11, 2012 email the following day. In the
19 email, I outlined her options, now that she had been sentenced in
20 the State Case. I referenced our prior discussions about whether
21 to pursue the direct appeal of her sentence or take the Rule 35
22 option, and reminded her that she chose the Rule 35 option
23 because the likelihood of success on her appeal was very slim. I
24 related that her best option was still the potential Rule 35
25 Motion and inquired whether there was "ANYTHING she could provide
26 whether it is case related or not." I further explained that I
27 would need information regarding potential cooperation from Ms.
28 Toscano via a letter for the Rule 35 option. I also noted that,

1 as I had explained to Mr. Tillery, her options at this point were
2 limited - other than the potential Rule 35 Motion - to a 2255
3 Motion based on ineffective assistance of counsel. Finally, I
4 explained to Ms. Toscano how to file a 2255 Motion pro se.

5 15. I did not hear from Ms. Toscano again until
6 approximately 10 months later, on or about March 3, 2011, when I
7 received an email. In the email, Ms. Toscano requested a copy of
8 her appeal. I responded to Ms. Toscano's email the same day,
9 agreeing to send her a copy of the appeal, but reminding her that
10 she had dismissed her appeal in order to pursue the Rule 35
11 option. I related that I previously had given a copy of the Rule
12 35 (Post-Conviction Agreement) to Mr. Tillery, but would mail
13 another copy to her. I also related that she likely was out of
14 time to file the 2255 Motion.

15 16. I never related to Ms. Toscano that the government had
16 filed a Rule 35 Motion and promised to send her a copy. To the
17 contrary, in my communications with her, I repeatedly requested
18 information relating to her cooperation so that I could present
19 that information to the government for consideration of a Rule 35
20 Motion.

21
22 I declare under penalty of perjury that the foregoing is
23 true and correct.

24 Executed on this 20th day of April, 2012 in Ohio.

25
26 /s/
27 MARK H. ALLENBAUGH
28 Assistant United States Attorney